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No. 839

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**In the Supreme Court of the United States**

OCTOBER TERM, 1943

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**L. METCALFE WALLING, ADMINISTRATOR OF THE  
WAGE AND HOUR DIVISION, UNITED STATES DE-  
PARTMENT OF LABOR, PETITIONER**

**v.**

**PLYMOUTH MANUFACTURING CORP., ET AL.**

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**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH  
CIRCUIT**

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**SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER**

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## SUPPLEMENTAL MEMORANDUM FOR THE PETITIONER

The "Explanatory Note" at the end of the respondents' brief in opposition brings to the Court's attention the fact that since the decision below the Plymouth Manufacturing Corporation was dissolved, and its property disposed of "to five or six other persons \* \* \* who now hold the same as tenants in common." As appears from the affidavit of Albert A. Ewbank, attached hereto, the real and personal property of the corporation is shown to have been transferred to Sam Tomlinson and his wife and six children.

(1)

Tomlinson had owned or controlled substantially all the shares of stock of the corporation.

Tomlinson personally was a defendant below and is a respondent here. Irrespective of whether the dissolution abates the case as against the Plymouth Manufacturing Corporation, it does not affect the proceeding in so far as it involves Tomlinson and the other respondents.

Respectfully submitted.

CHARLES FAHY,  
*Solicitor General.*

APRIL 1944.

STATE OF INDIANA,  
*County of Marion, ss.:*

**AFFIDAVIT OF ALBERT W. EWBANK**

Comes now Albert W. Ewbank and being duly sworn upon his oath, says that he is an attorney employed by the United States Department of Labor, Office of Solicitor, and that he is assigned to duty within the Ninth Region of the Wage and Hour and Public Contracts Divisions, which Region comprises the States of Illinois, Wisconsin, and Indiana, and that his official duty station is located in Indianapolis, Indiana, and that in the course of his duties as attorney, he has charge of the conduct of legal matters pertaining to the enforcement and administration of the Fair Labor Standards Act of 1938 and the Public Contracts Act of 1936. That this affiant is now and has been for more than ten years last past a member of the Bar of the State of Indiana and as such is generally familiar with the official records maintained and kept in the various State and County offices.

This affiant further states that he has examined the Articles of Dissolution filed in the office of the Secretary of State, State House, Indianapolis, Indiana, and in the Office of the County Recorder, Marshall County, Indiana, in the matter of the PLYMOUTH MANUFACTURING CORPORATION. That

the Articles of Dissolution so filed in the Office of the Secretary of State were approved by Rue J. Alexander, the duly elected and acting Secretary of State of the State of Indiana on March 18, 1943. A copy of said Articles of Dissolution filed and approved by the Secretary of State were duly filed and entered in the records now in the possession and control of the Recorder of Marshall County, Indiana on April 2, 1943 and that said Recorder is the proper custodian of such records. Said Articles of Dissolution as filed in the Office of said Secretary of State and said Recorder of Marshall County show within their body that with the authority and at the direction of the owner of all shares of the preferred and common stock of the PLYMOUTH MANUFACTURING CORPORATION, all of the assets as payment in full of all debts and liabilities of the corporation of every kind and character, were distributed and transferred in kind as of December 31, 1941 according to an agreement reached during the month of December 1941 to the following named parties, to wit: Sam Tomlinson, Helen Tanner, Bertis M. Jacox, Paul A. Tomlinson, Doris J. Wass, Florence Joyner, Carrie Tomlinson, and Lydia Olga Rullman. That said assets according to said Articles of Dissolution consist of the following described property: real estate and lease, machinery and equipment, and office furniture and fixtures.

That this affiant has diligently and carefully examined the records in the office of the Recorder of Marshall County located in the Court House in Plymouth, Indiana, the proper custodian of all deeds, mortgages, and miscellaneous records pertaining to real estate transactions within said Marshall County, State of Indiana, and that such examination by this affiant discloses the recordation of a warranty deed executed by the PLYMOUTH MANUFACTURING CORPORATION by its officers, Sam Tomlinson, president, and Hubert Tanner, its secretary, under date of July 1, 1942, which warranty deed purports to convey to the following named persons the real estate owned in fee simple by the said PLYMOUTH MANUFACTURING CORPORATION, to wit: Sam Tomlinson, Helen Tanner, Bertis M. Jacox, Paul A. Tomlinson, Doris J. Wass, Florence Joyner, Carrie Tomlinson, and Lydia Olga Rullman, in Marshall County in the State of Indiana. That said grantees in the deed are the one and the same persons enumerated in the Articles of Dissolution hereinbefore referred to. That a duly certified copy of said warranty deed is herewith attached and made a part of this affidavit and for identification is referred to as "Exhibit A." That said deed appears of record in deed record 120 at page 137-138 in the records made and kept by said Recorder.

That this affiant is informed and believes that Sam Tomlinson and Carrie Tomlinson, named as

grantees in said deed, are husband and wife and reside at 310 North Walnut Street in the town of Plymouth, Marshall County, Indiana; that said Sam Tomlinson is the one and same person who signed said warranty deed for and in behalf of the corporation as its president. That Helen Tanner named as a grantee in said deed, daughter of said Sam Tomlinson and Carrie Tomlinson and is the wife of Hubert Tanner, who signed said warranty deed for and in behalf of said corporation as its secretary; that said Helen Tanner resides on West Garro Street in the town of Plymouth, Marshall County, Indiana. That Bertis M. Jacox, named as a grantee in said warranty deed is the daughter of Sam Tomlinson and Carrie Tomlinson and this affiant is informed and believes that said Bertis M. Jacox is the wife of Paul Jacox and that said Bertis M. Jacox is a resident of the State of Florida. That this affiant is further informed and believes that Paul A. Tomlinson, named as a grantee, is the son of Sam Tomlinson and Carrie Tomlinson and that as this affiant is further informed and believes, such grantee, Paul A. Tomlinson, was lately a resident of the city of Mishawaka, County of St. Joseph, Indiana. That this affiant is further informed and believes that Doris J. Wass, named as a grantee in said warranty deed, is a daughter of said Sam and Carrie Tomlinson, and that she is the wife of one Donald Wass and is now a resi-



dent of the State of Missouri. This affiant is further informed and believes that Florence Joyner is a daughter of Sam and Carrie Tomlinson and is a resident of the State of Ohio and is now residing in or near the city of Akron within said State. This affiant is further informed and believes that Lydia Olga Rullman is a daughter of Sam and Carrie Tomlinson and is the wife of Martin L. Rullman named in the Articles of Dissolution as a director of said PLYMOUTH MANUFACTURING CORPORATION, and resides at 307 East Garro Street, within the town of Plymouth, Marshall County, State of Indiana. This affiant is informed and believes that the aforementioned Helen Tanner, Bertis M. Jacox, Paul A. Tomlinson, Doris J. Wass, Florence Joyner and Lydia Olga Rullman named as grantees in said warranty deed are all of the children of Sam Tomlinson, the president of the PLYMOUTH MANUFACTURING CORPORATION, now dissolved, who is the one and the same person as Sam Tomlinson named as a grantee in said warranty deed filed and recorded in the office of the Recorder of Marshall County in the Court House in the town of Plymouth within said county. That the information and belief of this affiant is based upon information obtained by affiant from Margaret Jacoby, a deputy in the Office of the Recorder of Marshall County who has for many years known Sam Tomlinson, Carrie Tomlinson, and the chil-

dren of said Sam Tomlinson, and from information obtained from George F. Stevens, a practicing attorney in the town of Plymouth, Indiana, who has been a resident of Plymouth for many years, and who is well acquainted with Sam Tomlinson and the members of his immediate family.

That this affiant has diligently searched the records in the Office of the Recorder of Marshall County, Indiana, and finds no record of a lease purported to have been executed by the PLYMOUTH MANUFACTURING CORPORATION to the PLYMOUTH MANUFACTURING COMPANY in 1938 for the real estate described in the warranty deed which is herewith attached to Exhibit "A." That the affiant is unable after diligent search to find any record in the office of the Recorder of Marshall County of any assignment or other disposition of any assets designated as a leasehold interest for the real estate described in said warranty deed herewith attached as Exhibit "A," and which lease is enumerated among the assets transferred and distributed to the said Sam Tomlinson, Carrie Tomlinson, Helen Tanner, Bertis M. Jacox, Paul A. Tomlinson, Doris J. Wass, Florence Joyner, and Lydia Olga Rullman, in accordance to their respective interests as set forth in the Articles of Dissolution of the PLYMOUTH MANUFACTURING CORPORATION.

That this affiant has examined the transfer books in the Office of the Auditor of Marshall

County and said transfer book shows a transfer of the real estate described as follows: N-6 a of S., 16 a of N.  $\frac{1}{2}$  of S. W.  $\frac{1}{4}$ , ex. RR and ex. Thayer's Add'n. and ex. Artificial Ice Company property, Lot 12, M. R. L. from the PLYMOUTH MANUFACTURING CORPORATION to Sam Tomlinson, Helen Tanner, Bertis M. Jacox, Paul A. Tomlinson, Doris J. Wass, Florence Joyner, Carrie Tomlinson, and Lydia Olga Rullman, which is the transaction hereinbefore referred to in the warranty deed duly recorded in the Office of the Recorder, Marshall County. That said transfer is also noted in the 1941 Assessor's Book, Line 994, which is in the Office of the County Assessor of Marshall County, Indiana.

That this affiant has examined the 1943 assessment records of said real estate, which assessment is recorded in the Assessor's Book for 1943 of Plymouth City at Page 191 thereof, Line 1390, which shows that the assessment of said property was made as of March 1, 1943 in the name of Sam Tomlinson, et al. Said assessment shows said valuation of said real estate to be \$535, the value of the improvements thereon as \$4,200, and the total assessed valuation of the land and improvements as of \$4,735. Said 1943 Assessor's Book of Plymouth City shows the personal assessment for personal property of Sam Tomilson, et al. as \$2,455 on the factory property hereinbefore described. Said Assessor's Book of 1943 herein-

before referred to is now in the Office of the Auditor of Marshall County, Indiana, the proper custodian of said records.

This affiant states further that he has made a diligent and careful search of the records in the office of the County Assessor of Marshall County and has examined the schedule of personal property filed by Sam Tomlinson and by Sam Tomlinson, et al (co-tenants) and by the PLYMOUTH MANUFACTURING COMPANY as of the first day of March, 1943. The records in said Office of the County Assessor, Schedule No. 3012 of Sam Tomlinson, residing at 310 North Walnut Street, Plymouth, Indiana, and which schedule is subscribed and sworn to by Hubert Tanner, for and on behalf of Sam Tomlinson before Frank E. Head, a deputy in the County Assessor's Office, shows such total personal assessment of Sam Tomlinson as \$425. Schedule No. 3013 purporting to be a schedule of the factory property of Sam Tomlinson, et al (a co-tenancy) located at Novelty and Walnut Streets in the town of Plymouth, Indiana, shows a schedule of office equipment in said factory property listed as \$55 and factory machinery and equipment as of \$2,400, showing the total assessed valuation \$2,455 upon said personal property located in the factory building located at Novelty and Walnut Streets, which factory building is situate upon the real estate described in the warranty deed set out herein as Exhibit "A." The

oath attached to said schedule is signed by Sam Tomlinson, et al (co-tenancy) by Hubert Tanner, subscribed and sworn to before Frank E. Head, a Deputy Assessor of Marshall County, Indiana on the 15th day of April, 1943. Such schedules of the personal property above referred to are upon the form schedules prescribed by the State Board of Tax Commissioners of the State of Indiana. The schedule for the PLYMOUTH MANUFACTURING COMPANY, a Partnership, is filed upon a form prescribed by the State Board of Tax Commissioners of the State of Indiana for use by Domestic and Foreign Corporations, Individuals, Partnerships, Firms and Unincorporated Associations having tangible property within the State of Indiana, which schedule was subscribed and sworn to by Chester H. Thompson for the PLYMOUTH MANUFACTURING COMPANY by Frank E. Head, a Deputy Assessor for Marshall County, Indiana on April 13, 1943, and is filed as No. 2499, in the book including the letter "P" in the County Assessor's Office of Marshall County, Indiana. That such partnership schedule shows no real estate or intangible property owned by the PLYMOUTH MANUFACTURING COMPANY. Said schedule shows the declared value of the cash on hand, as \$500 and the declared valuation of a Chevrolet town sedan used as delivery equipment by the company as \$590, and a declared valuation of the total inventory of all personal property then on hand as \$15,000.

Said total declared valuation on said schedule is shown to be \$16,090.

That no schedules for assessments as of March 1, 1944 are available in the Office of the Assessor of Marshall County, as such assessments have not been made by Frank E. Head, Deputy Assessor of Marshall County, Indiana.

This affiant is further informed and believes that the shares of stock listed in the Articles of Dissolution as 416 shares of common stock and 120 shares of preferred stock were all held by Sam Tomlinson or by members of his immediate family and that all shares of common and preferred stock outstanding of the PLYMOUTH MANUFACTURING CORPORATION, now dissolved, were vested in, owned by, or controlled by Sam Tomlinson, and that any shares of stock purported to be outstanding in the name of any other individuals, namely, William H. Wolfarth, now deceased, Chester H. Thompson, or Geo. E. Warren, were merely transfers of record on the corporation books, but that such shares of stock were never in fact, as this affiant is informed and believes, owned by or vested in said William H. Wolfarth, now deceased, Geo. E. Warren or Chester H. Thompson. That Hubert Tanner, Secretary of said corporation, listed also as an owner of shares of stock in the said PLYMOUTH MANUFACTURING COMPANY, is the husband of Helen Tanner, the daughter of Sam Tomlinson, and that any such shares owned by, trans-

ferred or assigned to said Hubert Tanner as Secretary of the Corporation were indirectly controlled by said Sam Tomlinson.

And further affiant saith not.

ALBERT W. EWBANK.

Subscribed and sworn to before me this 26th day of April 1944.

EDWIN STEERS, SR.,  
*Notary Public.*

My Commission expires Nov. 10, 1946.

## EXHIBIT A

4396

### WARRANTY DEED

THIS INDENTURE WITNESSETH, That Plymouth Manufacturing Corp., of Marshall County, in the State of Indiana, Conveys and Warrants to Sam Tomlinson, Carrie Tomlinson, Helen Tanner, Bertis M. Jacox, Paul A. Tomlinson, Doris J. Wass, Florence Joyner, and Lydia Olga Rullman of Marshall County, in the State of Indiana, for and in consideration of One and no/100— (\$1.00)—Dollars, the receipt whereof is hereby acknowledged, the following described Real Estate in Marshall County, in the State of Indiana, to wit:

The North Six (6) acres of the South Eighteen (18) acres of the North Half (N $\frac{1}{2}$ ) of the Southwest fractional Quarter West of the Michigan Road of section Twelve (12) Michigan Road Lands, except the right of way of the Terre Haute and Logansport Railroad Company (known as the Vandalia Road) and except Thayer's North Addition to the City of Plymouth, which addition is laid off and platted on the East 327 feet of said Six (6) acre tract, also except the Artificial Ice Company Lot, being Ninety (90) feet wide at the South end and Eighty (80) feet wide at the North end, off of the entire east side of the following described tract: The North Six (6) acres of the South Eighteen (18) acres of the



North Half ( $N\frac{1}{2}$ ) of the Southwest fractional Quarter (SW fr.  $\frac{1}{4}$ ) of Section Number Twelve (12) Michigan Road Lands, West of the Michigan Road, except the right of way of the Terre Haute and Logansport Railroad (known as the Vandalia Railroad) off of the West end, and except Thayer's North Addition to the City of Plymouth off the east end thereof, platted on the East three hundred twenty-seven (327) feet of the said tract.

IN WITNESS WHEREOF, The said Plymouth Manufacturing Corp., by its President and Secretary, has hereunto set its hand and seal, this 1st day of July 1942.

PLYMOUTH MANUFACTURING  
CORP.

[SEAL]

By SAM TOMLINSON,  
*President.*

[SEAL]

HUBERT TANNER,  
*Secretary.*

[SEAL]

STATE OF INDIANA,

*Marshall County, ss:*

Before me, the undersigned, a Notary Public in and for said County and State, this 1st day of July A. D. 1942, personally appeared the within named Plymouth Manufacturing Corp., by its President, Sam Tomlinson, and its Secretary, Hubert Tanner, Grantor in the above conveyance, and acknowledged the same to be its voluntary act and deed, for the uses and purposes herein mentioned.

I have hereunto subscribed my name and affixed my official seal.

[NOTARY PUBLIC SEAL]

ALBERT B. CHIPMAN,  
*Notary Public.*

My Commission expires June 6, 1946.

No Revenue Stamps attached.

Received for record September 18th, 1942, at  
3:25 o'clock P. M.

[S] HERBERT A. PETERSON,  
*Recorder of Marshall County, Indiana.*

(16)

